

**IN THE SUPREME COURT OF IOWA**

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**No. 17-0752**

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**PAUL J. BURROUGHS, KENNETH BURROUGHS, TERRI SPINNER, DAVID  
SPINNER, SEAN HARVEY and TY HARVEY,**

**Plaintiffs-Appellants,**

**v.**

**THE CITY OF DAVENPORT ZONING BOARD OF ADJUSTMENT, THE  
CITY OF DAVENPORT, IOWA and MZ. ANNIE-RU DAYCARE CENTER,**

**Defendants-Appellees.**

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**APPELLEES' FINAL BRIEF**

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**APPEAL FROM IOWA DISTRICT COURT FOR SCOTT COUNTY  
THE HONORABLE MARK J. SMITH  
SCOTT COUNTY CASE NO. EQCE128560**

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DAVENPORT, IOWA**

## **TABLE OF CONTENTS**

Table of Authorities .....	ii
Statement of the Issues Presented for Review .....	iii
Statement of the Case .....	1
Routing Statement .....	5
Argument .....	5
I. THE STANDARD OF REVIEW IS FOR CORRECTION OF ERRORS AT LAW .....	6
II. THE PLAINTIFFS FAILED TO TIMELY FILE THEIR PETITION UNDER IOWA RULE OF CIVIL PROCEDURE 1.1402 OR IOWA CODE 414.15. ....	7
A. Plaintiffs' Petition Is Untimely Under Rule 1.1402 Because the Petition Was Not Filed Within Thirty Days of the Board's Decisions. ....	7
B. Plaintiffs' Petition Is Untimely Under Iowa Code Section 414.15 Because the Petition Was Not Filed Within Thirty Days After the Filing of the Decision in the Office of the Board. ....	9
III. PLAINTIFFS FAILED TO PRESERVE ERROR ON WHETHER THE MEETING MINUTES COMPLY WITH IOWA CODE SECTION 414.15 AND DAVENPORT MUNICIPAL CODE 17.52.020(B). ....	12
Conclusion .....	13
Certificate of Compliance .....	15
Certificate of Filing .....	15
Certificate of Service .....	15

## **TABLE OF AUTHORITIES**

### **CASES**

	<b><u>PAGE</u></b>
<i>Chrischilles v. Arnolds Park Zoning Bd. of Adjustment</i> , 505 N.W.2d 491 (Iowa 1993) .....	1, 2, 3
<i>Arkae Development, Inc. v. Zoning Bd. of Adjustment of City of Ames</i> , 312 N.W.2d 574 (Iowa 1981) .....	1, 2, 3
<i>State v. Iowa Dist. Court for Webster County</i> , 801 N.W.2d 513 (Iowa 2011) .....	2, 3, 4, 7
<i>Sergeant Bluff-Luton School Dist. V. City Council of City of Sioux City</i> , 605 N.W.2d 294 (Iowa 2000) .....	2, 3, 7, 8
<i>Regent Ins. Co. v. Estes Co.</i> , 564 N.W.2d 846 (Iowa 1997) .....	2, 3
<i>City of Johnston v. Christenson</i> , 718 N.W.2d 290 (Iowa 2006) .....	2, 3, 8, 9
<i>Schaefer v. Putnam</i> , 841 N.W.2d 68 (Iowa 2013) .....	2, 10
<i>Lauridsen v. City of Okoboji Bd. of Adjustment</i> , 554 N.W.2d 54 (Iowa 1996) .....	2, 4, 10
<i>Duck Creek Tire Service, Inc. v. Goodyear Corners, L.C.</i> , 796 N.W.2d 886 (Iowa 2011) .....	2, 4, 13
<i>Meier v. Senecaut III</i> , 641 N.W.2d 532 (Iowa 2002) .....	2, 4, 13
<i>Stammeyer v. Division of Narcotics Enforcement of Iowa Dept. of Public Safety</i> , 721 N.W.2d 541 (Iowa 2006) .....	2, 4, 13
<i>In re Detention of Matlock</i> , 860 N.W.2d 898 (Iowa 2015) .....	2, 4, 13

### **Other References:**

Iowa R. App. P. 61101(3)(a) .....	2, 6
Iowa R. Civ. P. 1.1402 .....	2, 3, 6, 7, 8

Iowa Code § 414.15 .....	1, 3, 4, 6, 7, 9, 10, 11, 12, 13
<i>Webster’s Ninth New Collegiate Dictionary</i> 820 (1983) .....	3, 4, 10
<i>Black’s Law Dictionary</i> (8th ed. 2004).....	3, 4, 11
Davenport Municipal Code 17.52.020(B) .....	1, 3, 4, 12, 13

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. THE STANDARD OF REVIEW IS FOR CORRECTION OF ERRORS AT LAW.**

*State v. Iowa Dist. Court for Webster County*, 801 N.W.2d 513 (Iowa 2011)

*Sergeant Bluff-Luton School Dist. V. City Council of City of Sioux City*, 605 N.W.2d 294 (Iowa 2000)

Iowa R. Civ. P. 1.1402

### **II. THE PLAINTIFFS FAILED TO TIMELY FILE THEIR PETITION UNDER IOWA RULE OF CIVIL PROCEDURE 1.1402 OR IOWA CODE 414.15.**

*Chrischilles v. Arnolds Park Zoning Bd. of Adjustment*, 505 N.W.2d 491 (Iowa 1993)

*Arkae Development, Inc. v. Zoning Bd. of Adjustment of City of Ames*, 312 N.W.2d 574 (Iowa 1981)

*Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846 (Iowa 1997)

#### **A. Plaintiffs’ Petition Is Untimely Under Rule 1.1402 Because the Petition Was Not Filed Within Thirty Days of the Board’s Decisions.**

*State v. Iowa Dist. Court for Webster County*, 801 N.W.2d 513 (Iowa 2011)

Iowa R. Civ. P. 1.1402

*City of Johnston v. Christenson*, 718 N.W.2d 290 (Iowa 2006)

*Sergeant Bluff-Luton School Dist. V. City Council of City of Sioux City*, 605 N.W.2d 294 (Iowa 2000)

**B. Plaintiffs’ Petition Is Untimely Under Iowa Code Section 414.15 Because the Petition Was Not Filed Within Thirty Days After the Filing of the Decision in the Office of the Board.**

*State v. Iowa Dist. Court for Webster County*, 801 N.W.2d 513 (Iowa 2011)

Iowa Code § 414.15

*Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 54 (Iowa 1996)

*Webster’s Ninth New Collegiate Dictionary* 820 (1983)

*Black’s Law Dictionary* (8th ed. 2004)

**III. THE PLAINTIFFS FAILED TO PRESERVE ERROR ON WHETHER THE MEETING MINUTES COMPLY WITH IOWA CODE SECTION 414.15 AND DAVENPORT MUNICIPAL CODE 17.52.020(B).**

*Duck Creek Tire Service, Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886 (Iowa 2011)

*Meier v. Senecaut III*, 641 N.W.2d 532 (Iowa 2002)

*Stammeyer v. Division of Narcotics Enforcement of Iowa Dept. of Public Safety*, 721 N.W.2d 541 (Iowa 2006)

*In re Detention of Matlock*, 860 N.W.2d 898 (Iowa 2015)

Iowa Code § 414.15

Davenport Municipal Code 17.52.020(B)

## **STATEMENT OF THE CASE**

Davenport Family Homes LTD is the owner of commercial property located at 1112 Bridge Avenue, Davenport, Iowa (the “Property”). The Property is operated as a as childcare center under a special use permit (the “Special Use Permit”) issued by the City of Davenport (the “City”) Zoning Board of Adjustment (the “Board”) on March 3, 2014.<sup>1</sup> In April, 2016, Mz. Annie-Ru Daycare Center, LC (“Mz. Annie”) contacted the City about operating a daycare center at the Property. The City Zoning Administrator, Matthew Flynn (“Flynn”) and other City staff reviewed Mz. Annie’s request and determined that Mz. Annie’s proposed daycare center was already authorized under the Special Use Permit and that the Special Use Permit was still valid and “runs with the land”.

This Petition for Writ of Certiorari arises from Plaintiffs’ challenge of two separate proceedings and decisions by the Board regarding the Special Use Permit. The first proceeding and decision by the Board occurred on October 13, 2016. This proceeding involved an appeal by the Plaintiffs challenging the decision by Flynn that the Special Use Permit was still valid and runs with the land. (Memorandum of Law in Support of Pre-Answer

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<sup>1</sup> The Property is zoned R-4 Moderate Density Dwelling District, and a special use permit is required to operate a daycare within this zoning classification, under the Davenport Zoning Ordinance.

Motion to Dismiss, Exhibit A) (App. p. 47). At the hearing on October 13, 2016, the Plaintiffs argued that Mz. Annie was operating illegally because it had not applied for nor received a new special use permit from the City. City staff had previously ruled that Mz. Annie was entitled to rely on the existing Special Use Permit granting in 2014 authorizing the operation of a daycare facility, and that no new permit was required. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit A) (App. p. 47). Flynn and City staff determined that because the Special Use Permit “runs with the land”, Mz. Annie did not have to file a new application for a new special use permit to operate a daycare center at the Property. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit A) (App. p. 47). Flynn and City staff recommended the Board uphold this determination on appeal. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit A) (App. p. 47). On October 13, 2016, the Board unanimously voted 4-0 to uphold this determination and rejected the Plaintiffs’ appeal to overrule the City staff’s decision. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit A) (App. p. 48).

The minutes of the Board’s October 13, 2016 meeting were filed on the City’s website and available for public inspection by October 27, 2016. (Affidavit of Matt Flynn, ¶ 4) (App. p. 75). In addition to the written meeting

minutes, which include the Board's recommendation and findings of fact, the meeting minutes also incorporate by reference "all reports, documents, presentations, videos and the hearing's video recording." (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit A) (App. p. 47). Following the denial of the appeal, the Board suggested to the Plaintiffs that if they believed the Special Use Permit should be revoked, the Plaintiffs could file a separate petition to revoke the Special Use Permit.

Following the Board's suggestion, on November 14, 2016 the Plaintiffs filed a petition to revoke the Special Use Permit. The second proceeding and decision by the Board occurred on December 8, 2016. This proceeding involved the petition by the Plaintiffs to revoke the Special Use Permit. At the December 8, 2016 hearing, the Plaintiffs argued that the Special Use Permit should be revoked because Mz. Annie operates twenty-four hours a day, seven days a week, and the Special Use Permit does not provide safeguards for general welfare of the Plaintiffs' properties. The City staff determined that Mz. Annie was operating consistently with the existing Special Use Permit, and that the Special Use Permit was still compliant with the criteria for granting a special use permit under the Davenport Municipal Code. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit B) (App. p. 50). The City staff recommended that the Board deny



Plaintiffs' petition to revoke the Special Use Permit. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit B) (App. p. 50). On December 8, 2016, the Board unanimously voted 4-0 to deny Plaintiffs' petition to revoke the Special Use Permit. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit B) (App. p. 50). Plaintiffs were present with their attorney at the December 8, 2016 meeting of the Board and witnessed the vote.

The minutes of the Board's December 8, 2016 meeting were filed on the City's website and available for public inspection by December 22, 2016. (Affidavit of Matt Flynn, ¶ 5) (App. p. 75). The December 8, 2016 meeting minutes also incorporate by reference "all reports, documents, presentations, videos and the hearing's video recording." (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit B) (App. p. 49). Plaintiffs filed their Petition for Writ of Certiorari (the "Petition") on January 25, 2017 challenging these two decisions by the Board as illegal.<sup>2</sup>

On February 3, 2017, the City and Board filed a Pre-Answer Motion to Dismiss the Petition (the "Motion to Dismiss") arguing that the district court

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<sup>2</sup> The Petition was filed 104 days after the Board's October 13, 2017 decision and 90 days after the meeting minutes were posted to the City's website. The Petition was filed 48 days after the Board's December 8, 2016 decision and 34 days after the meeting minutes were posted to the City's website.

lacked subject matter jurisdiction because the Petition was not timely filed. On April 13, 2017, the district court issued a Ruling on Defendants' Motion to Dismiss (the "Ruling") finding the Petition was not timely filed and granted the City and Board's Motion to Dismiss. The Plaintiffs filed their Notice of Appeal on May 12, 2017 challenging the district court's Ruling.

### **ROUTING STATEMENT**

This case involves questions of applying existing legal principles and should be transferred to the Iowa Court of Appeals under Iowa R. App. P. 6.1101(3)(a).

### **ARGUMENT**

The sole issue in this case is whether the Plaintiffs timely filed their Petition. The Rules of Civil Procedure require that a petition for writ of certiorari be filed "within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1402. Under Iowa Code Chapter 414, the Petitioners were required to file their Petition "within thirty days after the filing of the decision in the office of the board." Iowa Code § 414.15. Under either of these standards, the Petitioners

failed to timely file their Petition.<sup>3</sup> Therefore, the Court should affirm the district court's Ruling dismissing the Plaintiffs' Petition.

**I. THE STANDARD OF REVIEW IS FOR CORRECTION OF ERRORS AT LAW.**

Review of certiorari actions is for correction of errors at law. *State v. Iowa Dist. Court for Webster County*, 801 N.W.2d 513, 517 (Iowa 2011). This Court's review in a certiorari proceeding is "governed by the rules applicable to appeals in ordinary civil actions." Iowa R. Civ. P. 1.1412; *Sergeant Bluff-Luton School Dist. v. City Council of City of Sioux City*, 605 N.W.2d 294, 297 (Iowa 2000). In such cases, the Court's review is limited to correction of errors at law, and the Court is bound by the findings of the district court if supported by substantial evidence in the record. *Id.*

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<sup>3</sup> The Petitioners argue that the district court misapplied *Chrischilles v. Arnolds Park Zoning Bd. of Adjustment*, 505 N.W.2d 491 (Iowa 1993) and *Arkae Development, Inc. v. Zoning Bd. of Adjustment of City of Ames*, 312 N.W.2d 574 (Iowa 1981) in granting the Motion to Dismiss. However, the Court need not decide whether the district court correctly applied *Chrischilles* and *Arkae Development* in this case because the granting of the Motion to Dismiss is properly sustained on alternative grounds presented to the district court. *See Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846, 848 (Iowa 1997) (finding an erroneous decision by a district court will be sustained if a separate ground, properly urged, is correct). Thus, even if the district court misapplied *Chrischilles* and *Arkae Development*, the Petition was still properly dismissed because the Plaintiffs failed to file within 30 days of the Board's actual decision or within 30 days of the filing of the decision in the office of the Board.

## **II. THE PLAINTIFFS FAILED TO TIMELY FILE THEIR PETITION UNDER IOWA RULE OF CIVIL PROCEDURE 1.1402 OR IOWA CODE 414.15.**

The Court's standard of review is for correction of errors at law. *Webster County*, 801 N.W.2d at 517. Plaintiffs have preserved error on this issue.

### **A. Plaintiffs' Petition Is Untimely Under Rule 1.1402 Because the Petition Was Not Filed Within Thirty Days of the Board's Decisions.**

To be timely, a petition for certiorari must be filed "within 30 days from the time the tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1402; *City of Johnston v. Christenson*, 718 N.W.2d 290, 302 (Iowa 2006) ("Petitions for certiorari must be filed within thirty days from the time of the board action."). Determining when the 30-day period begins to run involves identifying the action taken by the inferior board or tribunal that the petitioner alleges is illegal. *Sergeant Bluff-Lutton School Dist. V. City Council of Sioux City*, 605 N.W.2d 294, 297-98 (Iowa 2000). "The point an illegal act occurs is when the underlying proceeding becomes final." *Id.* at 297. A petition that is untimely filed deprives the reviewing court of subject matter jurisdiction. *Id.*

Here, the actions taken by the Board the Plaintiffs allege are illegal occurred on October 13, 2016 and December 8, 2016 respectively. On October

13, 2016, the Board unanimously voted 4-0 to reject the Plaintiffs' request to invalidate the City staff's determination that the Special Use Permit runs with the land. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit A) (App. p. 48). On December 8, 2016, the Board unanimously voted 4-0 to deny the Plaintiffs' petition to revoke the Special Use Permit. (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibit B) (App. p. 50). Both of these decisions were final decisions by the Board at the time they were made.<sup>4</sup> *See, e.g., City of Johnston*, 718 N.W.2d at (concluding that a vote by a zoning board of adjustment was the board's final decision for purposes of the 30-day period). Thus, October 13, 2016 and December 8, 2016 are the two dates from which to measure the 30-day filing requirement under Rule 1.1402 because this is when the Board allegedly "exceeded its jurisdiction or otherwise acted illegally." To be considered timely, then, the Plaintiffs were required to file the Petition challenging the Board's October 13, 2016 decision by November 14, 2016 and the Board's December 8, 2016 decision by January 9, 2017. However, the Plaintiffs did

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<sup>4</sup> The Plaintiffs do not argue these were not final decisions, only that the Board failed to issue written findings of fact. However, both the October 13, 2016 and December 8, 2016 meeting minutes contain a "Recommendation and Findings of Fact." Further, the meeting minutes incorporate by reference "all reports, documents, presentations, videos and the hearing's video recording." (Memorandum of Law in Support of Pre-Answer Motion to Dismiss, Exhibits A and B) (App. pp. 47, 49).

not file the Petition until January 25, 2017, clearly beyond the 30-day filing requirement.

**B. Plaintiffs’ Petition Is Untimely Under Iowa Code Section 414.15 Because the Petition Was Not Filed Within Thirty Days After the Filing of the Decision in the Office of the Board.**

Under Iowa Code § 414.15, a petition for writ of certiorari must be filed “within thirty days after the filing of the decision in the office of the board.” Iowa Code § 414.15 (emphasis added). However, Iowa Code § 414.15 does not specify when a decision is considered “filed” in the “office” of a board. Thus, to determine whether the Plaintiffs timely filed their Petition, the Court must interpret Iowa Code § 414.15.

In interpreting statutes, the Iowa courts follow well-settled principles of statutory interpretation:

The purpose of statutory interpretation is to determine the legislature’s intent. We give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law. We also consider the legislative history of a statute, including prior enactments, when ascertaining legislative intent. When we interpret a statute, we assess the statute in its entirety, not just isolated words or phrases. We may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction.

*Schaefer v. Putnam*, 841 N.W.2d 68, 75 (Iowa 2013). In the absence of a legislative definition, the dictionary is consulted to give words their ordinary

and common meaning. *Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543 (Iowa 1996).

An “office” is “a place in which the functions (as consulting, record keeping, clerical work) of a public officer are performed.” *Webster’s Ninth New Collegiate Dictionary* 820 (1983). The act of “filing” means “[t]o record or deposit something in an organized retention system or container for preservation and future reference,” or “[t]o acknowledge or deposit (a report, communication, or other document) for information and reference only without necessarily taking any substantive action.” *Black’s Law Dictionary* 660 (8th ed. 2004).

Here, the 30-day time periods to file an appeal under either Rule 1.1402 or Iowa Code § 414.15 are the same because the decisions of the Board were made and acknowledged for information and reference on the dates the Board voted – October 13, 2016 and December 8, 2016. However, even assuming arguendo the standard under § 414.15 is different from Rule 1.1402, the Plaintiffs still failed to timely file their Petition within thirty days after the “filing of the decision in the office of the Board.” The decisions of the Board and the entire records relating thereto, including the reports, documents, presentations and videos of the hearings, were published on the City’s website (an “organized retention system”) and available for public inspection by

December 22, 2016.<sup>5</sup> Thus, even using December 22, 2016 as the date of “filing of the decision in the office of the Board,” Plaintiffs were required to file their Petition by January 23, 2017 (the Monday following the 30 days), and they did not file until January 25, 2017.

In this modern age of electronic record retention, a “filing” can and does often occur via electronic data posted to a server rather than sheets of paper filed in a physical office. Plaintiffs interpret § 414.15 to require that the Board place a paper copy of its decision in a paper file, in a physical filing cabinet within a brick and mortar office. Nothing in § 414.15 requires any of this.<sup>6</sup> All that is required is that the Board record its decisions in “an organized retention system or container for preservation and future reference” and make them

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<sup>5</sup> The Plaintiffs claim the meeting minutes were not posted on the City’s website until January 6, 2017, but they provide no evidence to support this claim, and such claims are in direct contradiction to the Affidavit of Flynn who stated that the minutes from the October 13, 2016 meeting were posted on the City’s website by October 27, 2016, and the minutes from the December 8, 2016 meeting were posted on the City’s website by December 22, 2016. (Affidavit of Matt Flynn, ¶¶ 4-5) (App. p. 75). Further, the affidavit of John Lonergan submitted by Plaintiffs proves nothing. It states that February 13, 2017 Mr. Lonergan requested the “official Board file” on 1112 Bridge Avenue, which did not contain the meeting minutes. This is irrelevant for purposes of determining when the minutes were “filed” on the City’s website and available for public inspection.

<sup>6</sup> See *Holding v. Franklin County Zoning Bd. of Adjustment*, 565 N.W.2d 318, 320-21 (Iowa 1997) (analyzing the identical statutory language in Iowa Code § 335.18 and finding that the legislature has not imposed a requirement that zoning board records be stored in a specific location).



available for public inspection. This is exactly what the Board did.

**III. THE MEETING MINUTES COMPLY WITH IOWA CODE SECTION 414.15 AND DAVENPORT MUNICIPAL CODE 17.52.020(B).**

A significant part of the Plaintiffs’ argument on appeal is that the Board failed to issue written decisions and findings of fact. The Plaintiffs have not preserved error on this issue. To preserve error on appeal, a party must raise, and *a district court must rule on*, an issue. *Duck Creek Tire Service, Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 892 (Iowa 2011) (emphasis added). Even if a party properly raises an issue, if the district court fails to rule on it, a party must file a motion with the district court requesting a ruling on that issue to preserve error for appeal. *Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002). If there are alternative claims or defenses, and the district court does not rule on all of them, the losing party must file a post-trial motion to preserve error on the claims or defenses not ruled on. *Stammeyer v. Division of Narcotics Enforcement of Iowa Dept. of Public Safety*, 721 N.W.2d 541, 548 (Iowa 2006). A Plaintiff’s failure to request a ruling on an issue is a waiver of that issue. *In re Detention of Matlock*, 860 N.W.2d 898, 911 (Iowa 2015).

Here, it is undisputed that each of the Board’s October 13, 2016 and December 8, 2016 published meeting minutes contain a “Recommendation and Finding of Facts.” The Plaintiffs, however, have failed to preserve error

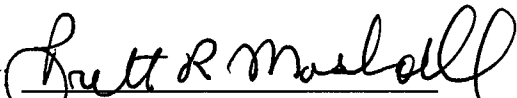
on whether the meeting minutes are sufficient to satisfy Iowa Code 414.15 and Davenport Municipal Code 17.52.020(B) because the district court did not rule on this issue. Plaintiffs failed to file any motions requesting a ruling from the district court on this issue. Thus, this issue has been waived.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs' claims should be rejected, and the district court's decision should be affirmed.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 3,603 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman.

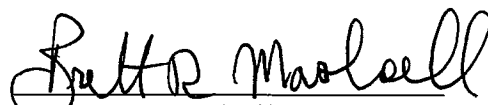
### **CERTIFICATE OF SERVICE AND FILING**

I certify that on September 26, 2017, I filed Appellees' Final Brief with the Clerk of the Appellate Court by electronically filing the document through the EDMS Electronic Filing System.

I further certify that on September 26, 2017, I served Appellees' Final Brief on the attorneys of record through the EDMS Electronic Filing System as follows:

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